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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE DANIEL GARCIA,

Defendant and Appellant.

G044012

(Super. Ct. No. 09CF2352)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frank F. Fasel, Judge. Affirmed in part, reversed in part, and remanded with directions.

Phillip I. Bronson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lise S. Jacobson and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Jose Daniel Garcia of transporting a controlled substance, heroin (Health & Saf. Code, § 11352, subd. (a)), possession of a firearm by a convicted felon (Pen. Code, § 12021, subd. (a)(1); all further undesignated statutory references are to this code), armed possession of a controlled substance (Health & Saf. Code, § 11370.1), and active participation in a criminal street gang (§ 186.22, subd. (a)). The jury also found Garcia committed the offenses for the benefit of, in association with, or at the direction of a criminal street gang (§ 186.22, subd. (b)). In a bifurcated proceeding after the verdict, Garcia admitted prior conviction allegations including a strike under the “Three Strikes” law (§§ 667, subds. (d), (e)(1); 1170.12, subds. (b), (c)(1)), a prior serious felony (§ 667, subd. (a)(1)), and two prison priors (§ 667.5, subd. (b)). The trial court imposed a 16-year prison term, including a concurrent sentence for active gang participation.

Garcia contends the trial court erred in denying his pretrial motion to “bifurcate” the substantive gang crime and the gang allegations from the underlying charges against him, and he also contends for the first time on appeal that admitting the gang evidence violated Evidence Code section 352. He challenges the sufficiency of the evidence to support the jury’s conclusion he possessed heroin in a vehicle he occupied with a fellow gang member. He argues the trial court erred in admitting expert testimony concerning the notion of a “gang gun” or, alternatively, he argues his trial attorney rendered ineffective assistance of counsel by failing to object to the testimony. He contests the sufficiency of the evidence to support his conviction for active gang participation because he claims his offenses were not gang related, and he asserts the evidence does not support the gang enhancement allegations. Finally, he contends the trial court’s imposition of sentence for his substantive gang crime violates section 654.

Only the last contention has merit under the Supreme Court's recent decision in *People v. Mesa* __ Cal.4th __ (June 4, 2012, S185688) (*Mesa*), and we therefore reverse that portion of the judgment with directions for the trial court to correct Garcia's sentence. We affirm the judgment in all other respects.

I

FACTUAL AND PROCEDURAL BACKGROUND

Responding to a citizen report of a pickup truck driving erratically, City of Orange Police Officer John Nisperos and his partner located the vehicle traveling southbound on The City Drive near the outdoor mall known as "The Block," a popular teenage "hangout" and thus, as the Attorney General observes, a good place to attempt to sell drugs. When the vehicle turned into The Block, the officers activated their overhead lights to stop the truck, which pulled into a parking stall.

As Nisperos approached the vehicle to contact the driver, Victor Ureno, he looked into the truck and noticed numerous hypodermic needles in the driver's side door pocket. The needles were filled with a dark substance resembling heroin. Ureno appeared to be under the influence of drugs or alcohol (a later breath test proved negative for alcohol), and he lied that he had just left the Carl's Jr. restaurant in The Block complex, claiming he was driving across the parking lot to "buy shoes" at the mall. Garcia, who does not challenge on appeal that he and Ureno were fellow, active "Eastside Anaheim" gang members, sat in the truck's passenger seat. Ureno and Garcia had been contacted together on previous occasions by gang investigators and, in an interview following their arrest here, Ureno admitted Eastside's activities included illegal firearm possession and narcotics offenses.

The officers searched the vehicle and recovered a large quantity of heroin and cash in the pickup truck, including: readily-saleable heroin doses in 13 syringes in the driver's side door compartment; another heroin-filled syringe in Garcia's pocket; \$5,000 in cash in Ureno's wallet; a 20-gram "giant rock" of heroin — suitable for at least 100 doses — in a bag behind the truck's center console; and a gun hidden out of view below the vehicle cupholders, with its handle pointing towards Garcia. The gun, a loaded .25-caliber Beretta handgun, may have been accessible by Ureno given its center location under the dashboard, but it was wedged behind a plastic piece of the dashboard. Its serial number had been scratched off. Two extra magazines rested next to the gun, and one included eight rounds of ammunition.

In another bag near the heroin rock found behind the center console, the officers found 100 new syringes and a spoon. Garcia had a blade in his pocket and the syringe he carried contained 0.02 grams of heroin, a small dose suitable for a novice with a low tolerance for the drug. The bag holding 100 syringes also contained numerous prescription pill bottles, including four with Ureno's name on them, while the names on the rest of the bottles had been rubbed off or were unreadable. The bottles were full of various pills. A separate brown bag contained 40 rounds of .25-caliber ammunition. The police found Ureno's cash-filled wallet in the driver's side door compartment, near the 13 syringes. Some of these syringes appeared used and contained only heroin residue, while the others were full and ready for use. Garcia admitted the syringe in his pocket contained heroin, but he denied knowledge of any of the other contraband in the vehicle, including the gun.

Detective Jonathan Yepes testified as the prosecution's gang expert. Yepes served as his gang unit's chief contact concerning the Eastside Anaheim gang, which he

estimated numbered about 120 individuals, approximately a quarter of whom he had personally spoken with over the years. Yepes explained the importance of revenue for gangs not only to enrich themselves and their members, but given the likely reality of serving prison time, to pay an entity known as the Mexican Mafia for “protection” in prison. According to Yepes, the Mexican Mafia operates as an “umbrella” gang protecting — presumably from other prison gangs — members of “southside or surenos” Hispanic gangs, including Eastside Anaheim. The group’s control is so far-reaching that state prisons are essentially “run by the Mexican Mafia,” at least from the viewpoint of Hispanic gang members. In exchange for protection, subscribing gangs and their members must pay “taxes” to the Mexican Mafia on revenue generated outside prison. Tax payments also protect the gang and its members from Mexican Mafia itself. In other words, those who do not “pay any tax or earn revenue [for] the Mexican Mafia . . . can be assaulted,” ranging “anywhere from a beating to being murdered.”

Yepes explained that “the easiest way for a gang member to earn money is by selling narcotics,” and that from these sales “they are expected to share a portion of [the proceeds] with their gang,” which in turn passes on a share to the Mexican Mafia. Not only can an individual expect prison repercussions for failure to pay Mafia dues, he can also face assault “for not sharing” narcotics revenue with his gang. Yepes had explored this issue among his gang contacts and found that if a gang member is “not bringing [in from narcotics sales] any of the proceeds or any of the revenue to the gang,” his fellow members “will go out and they will look for that guy and assault him . . . to let him know . . . he has to share. That he is expected to share.”

Yepes also explained the concept of a “gang gun.” First, Yepes explained that unlike in the “normal, daily life” of law-abiding citizens, in the gang subculture,

“[t]he more fear and intimidation that you are able to inflict upon other people, the more respect . . . you get for yourself and . . . for your gang.” Accordingly, because of their capacity for inflicting violent damage, guns are “the pinnacle tool . . . within a criminal street gang[.]” Given the difficulty of obtaining firearms and their importance in achieving gang objectives like attaining “respect,” protecting gang turf and engaging in other endeavors, including assaults and narcotics sales, a gun is a prized possession within a gang. Consequently, safekeeping a gang gun is a shared responsibility and the gun’s presence is therefore generally disclosed to fellow gang members, including new ones. Only more established members, however, are usually entrusted with a gun. The gun “basically . . . belongs to all members of the gang,” but “is typically passed around to those that are well-respected and that have shown that they can keep the gun and protect the gun. It is not given to just someone that’s brand-new into the gang, but they are made aware of the gang gun.”

In particular, a gang’s firearms are essential “to the sale and possession of street narcotics” because “they . . . need some sort of weapon to protect themselves from those that would — rival gangs who would — in street terminology . . . jack or steal from them,” in other words “take th[ose] narcotics from them.” As Yepes explained, “[T]hey have to protect themselves. And during the . . . sale process[] that engulfs transportation, manufacturing, and packaging, . . . they need to be able to protect themselves from rival gangs or rival distributors or [from other] narcotics dealers . . . coming in and taking th[ose] narcotics from them. So the best way is by having a firearm.” Yepes noted this was “especially true when they are transporting outside their gang territory,” as here, “[b]ecause they are no longer within their safe haven, so they need something to protect

themselves.” Given a gang’s criminal gun uses, a gang gun “tend[s] to be a gun that cannot be traced,” and therefore will typically have its serial number removed.

Yepes had specifically discussed the “gang gun” concept with at least 10 Eastside Anaheim members on different occasions, and they overwhelmingly confirmed it applied to Eastside. Garcia elicited Yepes’s clarification that mutual possession and access to a firearm applied to the relevant participants “only . . . if the[y] are gang members” and “[i]t doesn’t apply to non-gang members[.]” Garcia elicited the concession because he challenged below the prosecution’s evidence he was an active Eastside gang member. But he does not contest on appeal the sufficiency of the evidence to support the jury’s conclusion he was an active Eastside member at the time of the offense here.

II

DISCUSSION

A. *Severance, Bifurcation, and Evidence Code Section 352*

Garcia argues the trial court erred by denying his pretrial motion to “bifurcate” the substantive gang count (§ 186.22, subd. (a)) and the gang allegations (§ 186.22, subd. (b)) from the drug and firearm charges. While we agree it is “confus[ing]” (*People v. Burnell* (2005) 132 Cal.App.4th 938, 946, fn. 5), severance, not bifurcation, is the proper term for disengaging substantive counts for separate trials. In effect, Garcia sought a separate trial of the street terrorism charge. He also sought bifurcation of the gang enhancement allegations from the underlying drug and firearm charges. Bifurcation refers to determining within the same trial a substantive count before submitting the punishment allegation to the jury. (*Ibid.*) Thus, although he did

not refer expressly to severance, Garcia sought both severance and bifurcation, and we address these contentions together because they overlap.

Section 954 authorizes joinder of offenses for a single trial if they are “connected together in their commission,” but the trial court retains discretion to sever the counts “in the interests of justice” Enhancements, by definition, are inherently connected to the underlying offense, but as our Supreme Court has recognized, the trial court’s broad discretion to control the conduct of proceedings (§ 1044) furnishes the trial court with ample authority to bifurcate an enhancement allegation (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048-1049 (*Hernandez*)). The party seeking severance of substantive counts or bifurcation of an enhancement has the burden to “clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.” (*People v. Bean* (1988) 46 Cal.3d 919, 938 (*Bean*); accord, *Hernandez*, at p. 1051.)

The factors trial courts must consider in deciding whether to sever charges are: “(1) would the evidence of the crimes be cross-admissible in separate trials; (2) are some of the charges unusually likely to inflame the jury against the defendant; (3) has a weak case been joined with a strong case or another weak case so that the total evidence on the joined charges may alter the outcome of some or all of the charged offenses; and (4) is any one of the charges a death penalty offense, or does joinder of the charges convert the matter into a capital case. [Citation.]” (*People v. Marshall* (1997) 15 Cal.4th 1, 27-28.) We review the trial court’s ruling for abuse of discretion, bearing in mind the defendant’s burden to show prejudice from joinder. (*Ibid.*) “A determination that the evidence was cross-admissible ordinarily dispels any inference of prejudice” from the joinder of substantive counts. (*Id.* at p. 28.) The same is true on the question of whether

to bifurcate an enhancement allegation. (See *Hernandez, supra*, 33 Cal.4th at pp. 1049-1050 [“To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary”].) We evaluate a trial court’s severance and bifurcation decisions based on the record at the time of the ruling. (*People v. Hardy* (1992) 2 Cal.4th 86, 167; *Hernandez, supra*, 33 Cal.4th at pp. 1048-1050.)

Here, the trial court reasonably could conclude evidence of Garcia’s active gang participation (§ 186.22, subd. (a)) and evidence relevant to the gang enhancement (§ 186.22, subd. (b)) were also relevant and cross-admissible concerning the underlying drug and firearm charges. Garcia asserts the gang evidence should have been excluded because it was more prejudicial than probative (Evid. Code, § 352), but he did not raise that objection below, and the claim is therefore forfeited. (Evid. Code, § 353; *People v. Williams* (1997) 16 Cal.4th 153, 206.)

In any event, as the trial court observed in denying Garcia’s bifurcation motion, the anticipated testimony concerning gang narcotics trafficking and the use of a gang gun tied the offenses into the criminal street gang underworld. This evidence provided the causal connection between the drug, firearm, and gang offenses necessary to obtain joinder. (See *People v. Saldana* (1965) 233 Cal.App.2d 24, 29 [“causal connection or ‘transactional’ relationship” required to join offenses; accord, *Ondarza v. Superior Court* (1980) 106 Cal.App.3d 195, 203 [joinder of drug charges].) For example, the prosecution’s evidence that Garcia and Ureno were both long-time Eastside gang members, and that they had been contacted together in the past by gang investigators, tended to show they could rely on their mutual gang bond (*People v. Albillar* (2010)

51 Cal.4th 47, 60 (*Albillar*)) and on gang norms like disclosure and mutual use of a firearm to act in concert on a plan to traffic heroin from the truck.

Simply put, the gang evidence tended to show a motive and means of execution for Garcia's commission of these offenses. "Gang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167-1168; see also *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550 ["“Because a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence”"]); accord, *People v. Martin* (1994) 23 Cal.App.4th 76, 81-82 [gang activity or membership admissible as to motive, though damaging to defense].) Consequently, the trial court did not err in denying bifurcation or severance.

B. *Heroin Evidence in Count 3*

Garcia challenges the sufficiency of the evidence to support his conviction in count 3 for unlawful possession of a controlled substance while armed with a loaded, operable firearm. Health and Safety Code section 11370.1 proscribes armed possession of heroin, cocaine, methamphetamine, and similar substances. Of the seven elements of the offense, Garcia takes issue only with the evidence on the first three: (1) the defendant possessed a controlled substance, (2) knew of its presence, and (3) knew of the substance's nature or character as an illicit drug. (See CALCRIM No. 2303 [the remaining elements include: (4) the substance was heroin, (5) in a usable amount, (6) the firearm was loaded, operable, and available for offensive or defensive use, and (7) the defendant knew he had the firearm available].)

Garcia's challenge rests on his claim he did not know of the large quantity of heroin in the truck. Not only does the standard of review pose an insurmountable obstacle to Garcia's challenge, the premise of his argument is flawed. Specifically, he contests his constructive possession of *all* the heroin in the truck, but overlooks he physically possessed a heroin syringe in his pocket and admitted he knew it contained heroin. That is sufficient. (*People v. Rubacalba* (1993) 6 Cal.4th 62, 65-67 ["usable quantity" requirement]; see also *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [essential element of controlled substance possession includes "'a quantity usable for consumption or sale'"].) The prosecution's drug expert, Kirk Salmon, identified the 0.02 grams of heroin in Garcia's syringe as a usable amount, and Garcia did not and does not quarrel with that testimony. There is no dispute he possessed the syringe in his pocket or that he knew of its presence, and he admitted the substance in the syringe was heroin. His challenge on the knowledge and possession elements he now contests therefore fails.

Furthermore, the jury reasonably could conclude Garcia possessed all the heroin he was transporting with Ureno. We must view the evidence in the light most favorable to the judgment below (*People v. Elliot* (2005) 37 Cal.4th 453, 466), and the test is whether substantial evidence supports the verdict, not whether the evidence proves guilt beyond a reasonable doubt (*People v. Crittenden* (1994) 9 Cal.4th 83, 139). The reviewing court must affirm the judgment unless "upon no hypothesis whatever is there sufficient substantial evidence to support it. [Citation.]" (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) The fact that circumstances may be reconciled with a contrary finding does not warrant reversal of the judgment (*Bean, supra*, 46 Cal.3d at pp. 932-933)

and, accordingly, an appellant “bears an enormous burden” challenging the sufficiency of the evidence (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330).

Garcia relies on the principle that proximity to contraband is insufficient, standing alone, to establish possession. (See *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417 [no constructive possession by gang member of gang gun in motel room]; see also, e.g., *In re Elisabeth H.* (1971) 20 Cal.App.3d 323, 330 [“mere presence” in vehicle does not demonstrate possession of narcotics found in car].) Garcia relies on *United States v. Soto* (9th Cir. 1986) 779 F.2d 558 and similar cases where, in *Soto* for example, the defendant’s fingerprint on a shotgun in a van he recently entered as a passenger supported only his conviction for possession of that weapon and not other handguns within his reach in the back seat. (*Id.* at pp. 559-560.)

But there was more here than mere presence near contraband. Unlike in *Soto* and similar cases, Garcia’s possession of both a blade that could be used to scrape the heroin rock into smaller doses and a heroin-filled syringe prepared in the same manner as the other syringes in the truck connected him to a mobile distribution plot for all the heroin. Of course it is possible Garcia’s syringe was only for personal use, but the jury was not required to view the evidence that way, and the standard of review is to the contrary. Additionally, the prosecutor established at trial Garcia’s active gang participation, and Ureno’s admission Eastside’s activities included illegal narcotics offenses further implicated Garcia beyond just one syringe. Similarly, the gun in the dashboard at his feet with its handle facing him also pointed to Garcia’s supporting role in a distribution plan, ready to provide protection to Ureno if necessary. The evidence therefore amply supported the conclusion Garcia jointly possessed the mass of heroin

with Ureno. (*People v. Williams* (2009) 170 Cal.App.4th 587, 625 [“Possession may be physical or constructive, and more than one person may possess the same contraband”].)

Garcia challenges the validity of his alleged gun possession as evidence supporting his heroin possession. But as noted, the record supports the conclusion he possessed the heroin in the vehicle as part of a plan to distribute it, whether or not he also possessed the gun. In any event, we now turn to Garcia’s gun challenge.

C. *Gang Gun Testimony*

Garcia claims Yepes’s testimony concerning the gang gun concept “should have been excluded” because it amounted to expert determination of “an ultimate factual issue in the case, i.e., [Garcia]’s knowledge of the Beretta handgun” According to Garcia, the testimony constituted nothing more than Yepes directing “the jury how the gun expert believed the case should be decided” concerning Garcia’s alleged possession of the gun. Garcia did not, however, object on that ground, which would have provided the trial court and the prosecutor an opportunity to address the issue and “respond appropriately,” if necessary. (*People v. Partida* (2005) 37 Cal.4th 428, 435 [trial court does not err “in failing to conduct an analysis it was not asked to conduct”].) The claim is therefore forfeited. (Evid. Code, § 353.)

Garcia’s actual objection lacked merit. He objected that Yepes’s source for the gang gun concept, in addition to conversation with and instruction in gang habits by other law enforcement personnel, included discussions with gang members who confirmed the validity of the concept. Specifically, Garcia objected that Yepes’s account of gang members vouching for the reality of gang guns (““They say yes””) constituted unreliable hearsay. But the Supreme Court has expressly held a gang expert may rely on conversations with gang members in addition to information learned from colleagues

when opining about gang matters. (*People v. Gardeley* (1996) 14 Cal.4th 605, 620 (*Gardeley*).)

Attempting to circumvent his forfeiture for lack of a specific objection that the gang gun testimony intruded into an ultimate issue reserved for the jury, Garcia argues he received ineffective assistance of counsel (IAC). He asserts his attorney improperly failed to object under *People v. Killebrew* (2002) 103 Cal.App.4th 644 that, as occurred there, the gang expert's testimony on an ultimate issue "did nothing more than inform the jury how [the expert] believed the case should be decided" (*id.* at p. 685). This tack fails for several reasons.

First, *Killebrew* involved a gang expert's testimony concerning a hypothetical gang member's knowledge of a gun in a vehicle *other than* the one in which he was a passenger. The reviewing court concluded the hypothetical was so transparent that it constituted an opinion on the defendant's subjective state of mind, an issue reserved for the jury. But our Supreme Court has subsequently explained that hypotheticals mirroring the facts of the case are proper because expert opinion evidence must be "rooted in the evidence of the case being tried, not some other case." (*People v. Vang* (2011) 52 Cal.4th 1038, 1046.) Additionally, the court has explained an expert opinion on an ultimate issue is not necessarily forbidden where it aids the jury on unfamiliar topics, but only where it is "unhelpful" because it preempts a conclusion the jury can reach unaided by the testimony. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946, fn. 3 [expert may properly testify concerning typical gang member motivations and intent, though this touches on ultimate issues of motive and intent].)

Second and related, Yepes did not introduce the gang gun concept in response to a hypothetical posed by the prosecutor, but rather as part of his background

explanation of the high value gangs place on guns and that gang members therefore generally alert one another if a gun is present. The law is clear that a gang expert may testify on the culture and habits of criminal street gangs beyond the experience of most jurors, including typical gang beliefs and corresponding practices. (*Hernandez, supra*, 33 Cal.4th at p. 1049; *Gardeley, supra*, 14 Cal.4th at p. 619; see *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370 [“The use of expert testimony in the area of gang sociology and psychology is well established”].)

Third, Yepes did not direct the jury to conclude under the gang gun theory that Ureno *must* have told Garcia about the firearm in this case. Rather, Yepes testified only that gang members are generally “expected to tell each other” about the presence of a gun, but he expressly acknowledged “it doesn’t always happen” and that one has to “look at the facts of [each] case” to reach a conclusion whether the disclosure was made. Though he was entitled to offer an opinion on this topic in the form of a hypothetical (see *ante*, e.g., *Vang, Gonzalez, Gardeley*), it does not appear Yepes did so, instead leaving the determination entirely to the jury.

Fourth, Garcia’s premise on appeal is that Ureno, as the driver and registered owner of the vehicle in which the gun was found, presumably knew of the gun and therefore, under the gang gun concept, *he* told Garcia about the weapon. But the record is silent about who brought the gun into the vehicle or otherwise knew of the gun first. The jury was not required to decide this issue. But the record, independent of the gang gun concept that Garcia challenges on appeal, points to the conclusion that *Garcia* knew of and principally possessed the weapon. The handle pointed towards him, the weapon was wedged in a location more convenient for the passenger to reach than the driver or one engaged in drug sales through the driver’s side window, and, from the

passenger seat, Garcia could retrieve and use the weapon for offensive or defensive support of narcotics sales, if necessary. Thus, evidence of Garcia's involvement in a mobile heroin distribution scheme supported both the conclusion that Garcia did not possess his heroin-filled syringe solely for personal use and also, independent of the gang gun disclosure theory, that he held constructive possession of the gun to support the scheme. For all the foregoing reasons, there is no merit to Garcia's IAC challenge to the gang gun concept as an erroneous basis for his firearm possession convictions.

D. *Gang Contentions*

Garcia challenges the sufficiency of the evidence to support his conviction for active gang participation (§ 186.22, subd. (a)) because the prosecution did not establish "that the drug offense was gang related." Our Supreme Court has determined, however, that the "felonious criminal conduct" (*ibid.*) underlying a conviction for active gang participation need not be gang related (*Albillar, supra*, 51 Cal.4th at pp. 56, 58), and we are bound by that conclusion (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455).

Garcia also challenges the sufficiency of the evidence to support the jury's conclusion he committed his offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)). But it is enough, even without the evidence that Garcia was a long-time active Eastside member and that taxes on individual members' narcotics sales benefitted both his gang and the Mexican Mafia, that he committed the offense "in association with" (*ibid.*) Ureno, another established Eastside member (*Albillar, supra*, 51 Cal.4th at p. 60). This is particularly true given Ureno admitted Eastside's activities included narcotics offenses. (Cf. *People v. Ramon* (2009) 175 Cal.App.4th 843, 853; see also *People v.*

Ochoa (2009) 179 Cal.App.4th 650, 661, fn. 7 [evidence sufficient when defendant commits offense in association with fellow gang member].)

E. *Section 654*

Garcia correctly anticipated the Supreme Court's holding in *Mesa* that imposition of sentence on an active gang participation conviction must be stayed under section 654 when the conviction is based on an underlying felony for which the defendant is or has been punished. (*Mesa, supra*, __ Cal.4th at p. __.) A defendant may only be punished once for what the Supreme Court has determined is the same, single act.

III

DISPOSITION

The judgment is affirmed except that we reverse the trial court's imposition of sentence on the active gang participation (§ 186.22, subd. (a)) count. Sentencing on that count must be stayed under section 654, and we direct the trial court to modify the judgment accordingly, correct the abstract of judgment, and forward the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.